No. 13900

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

MARSHALL E. HAYES AND MARY I. HAYES, ALSO KNOWN AS BILL HAYES, HUSBAND AND WIFE, APPELLEE; M. HAYES, AND HARNEY COUNTY, A MUNICIPAL CORPORATION AND POLITICAL SUBDIVISION OF THE STATE OF OREGON, APPELLEES

and

MARSHALL E. HAYES AND MARY I. HAYES, ALSO KNOWN AS BILL HAYES, HUSBAND AND WIFE; AND APPELLEE M. HAYES, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON

BRIEF FOR THE UNITED STATES, APPELLANT

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OPINION BELOW

The district court did not write an opinion. Its remarks in making the rulings complained of are found at R. 150–155, 199–200 and R. 341–348.

JURISDICTION

This is an appeal from an order entered October 23, 1947 (R. 60–61). On January 16, 1948, the United States filed notice of appeal (R. 61–62).

The jurisdiction of the district court was invoked under the Migratory Bird Conservation Act, approved February 18, 1929, 45 Stat. 1222, as amended, 16 U. S. C. sec. 715, and the Act of August 1, 1888, 25 Stat. 357, as amended 40 U. S. C. sec. 257 (R. 2–7). The jurisdiction of this Court is invoked under section 128 of the Judicial Code, as amended 28 U. S. C. sec. 225 (a).

QUESTIONS PRESENTED

1. Whether a district court can strike a declaration of taking and dismiss the condemnation proceeding in which it was filed.

2. Whether, when owners of land against which a condemnation proceeding is pending agree with the Government upon the consideration for the transfer of title, the court may refuse to enforce the contract because it was executed without the advice and assistance of the owners' counsel.

STATEMENT

On April 22, 1946, the United States instituted proceedings to condemn 1,101.68 acres of land owned by Mary I. (Bell) Hayes and her husband, Marcellus B. Hayes, in Harney County, Oregon, for the purpose of providing an addition to the Malheur National Wildlife Refuge of Oregon (R. 2–7). On August 13

following, an amended complaint more particularly describing the land was filed (R. 9–14). On October 2, 1946, an answer was filed alleging that the property sought to be condemned had a value of $55,084 (R. 18–22).

On October 9, 1946, the landowners and their son Adelbert, in consideration of the sum of $16,000, agreed to the acquisition by the United States by judicial proceedings of the lands described in the amended complaint "subject to the reservation of the right to use in livestock ranching operations * * * the surveyed land and Special Master Tract 48 in the bed of Malheur Lake for a period of five (5) years from the date hereof in accordance with rules and regulations of the Secretary of the Interior." The agreement was executed by the United States on December 16, 1946 (R. 46–52, 92).

On February 11, 1947, pursuant to the Act of February 26, 1931, 46 Stat. 1421, as amended, 40 U. S. C. secs. 258a–258f, a declaration of taking covering the interest described in the agreement was filed, and the sum of $16,000, estimated to be just compensation, was deposited in the registry of the court (R. 23–26). A second amended complaint conforming to the declaration of taking was filed on February 13 (R. 27–33) and on February 26 judgment was entered on the declaration and immediate possession granted (R. 36–39).

On September 24, 1947, the district court heard testimony in respect of the circumstances of the de-

fendants' execution of the acquisition agreement (R. 90–150) which may be summarized as follows:

Mr. and Mrs. Hayes had owned and occupied the land since 1910 (R. 99, 107, 117). They were old (R. 94) but perfectly competent to engage in business affairs. They had been approached by employees of the Fish and Wildlife Service of the Department of the Interior, the acquiring agency, after the original condemnation complaint was filed (R. 97, 109–110, 111, 116). The negotiations lasted over a period of weeks (R. 99). Before the Hayeses agreed, they consulted their attorneys who advised them not to accept on the grounds that the price was too low and probably the offer was not in good faith (R. 100–102). They did not follow the advice.

They decided to sell because they thought the Government was going to condemn anyhow (R. 97, 103, 110–111, 113, 119, 122, 129). However, as the court pointed out (R. 139) no Government agent is authorized to represent that, if an owner of land will not settle, the Government will condemn. Mrs. Hayes was unaware that the Government need not take the property if it thought the award too high and testified that, if she had known this, she would have refused to sell (R. 131–132). Though Mr. Hayes had read the agreement, he testified he did not know it settled a claim against the Government under the Tucker Act worth about $700 (R. 118, 123; see also R. 140–141) and further that he was of the impression that, although the Government would pay $16,000 and give him a free five-year occupancy, he was also to have thereafter a perpetual option to rent (R. 120). The

Hayeses had not drawn the $16,000 deposited with the declaration (R. 107) and about a month before the trial had become dissatisfied with the bargain (R. 106, 107, 111–112, 129).

At the conclusion of the testimony, the trial judge announced his belief that "these people have unquestionably changed their minds" after being "perfectly well satisfied"[1] (R. 150; see also R. 115). Nonetheless, he held the contract was inadmissible (R. 153). At the time, he assigned two reasons: The first was that, in view of the Government's past representations to landowners and to the court, defendants were entitled to believe that the "Government was going to take this land in spite of everything" (R. 150–151). The second was that those who acted for the Government did not consult or call in defendants' attorneys before securing defendants' execution of the agreement (R. 151–152). A third reason—advanced in the course of the subsequent proceedings—was that Mr. Hayes believed that the agreement conferred an option to rent in perpetuity (R. 199–200).

Since the court refused to give effect to the contract, it was necessary to try the issue of valuation to the jury (R. 161–323). Witnesses for the defendants

[1] The judge said (R. 150):

> As far as the Court is concerned, I think these people have unquestionably changed their minds, notwithstanding their testimony. I think *they were perfectly well satisfied and would have taken this money and accepted this contract* at any time up until the first verdict came in in these cases, then they thought that there was a chance to capitalize on them, and that is their status. [Italics supplied.]

appraised the properties at $40,245 (R. 242) and $23,885.40 (R. 259). However, neither took account of the right reserved to use part of the land free of charge for five years (R. 261) which would reduce the market value (R. 262). Witnesses for the Government, having in mind the value of the reserved right, valued the properties at $10,800 (R. 291) and $9,922 (R. 311). The jury returned a verdict for $36,500 (R. 55–56) upon which judgment was entered (R. 56–59).

The Government moved to set aside the judgment and verdict and for a new trial (R. 59). After argument (R. 341), the court stated that the verdict could not stand because it was excessive (R. 342) and because the court should have allowed the contract to go to the jury in order for it to know that defendants had agreed to the value of $16,000 (R. 342–343).

However, the court reiterated its refusal to give effect to the contract on the ground that Hayes did not know that it did not contain a perpetual option to rent nor that it released another claim against the Government—mistakes he would not have made if defendants' lawyer had been present (R. 343-344).

It concluded that the Government should not be bound by a declaration of taking based upon the contract. "True," the court added, "the Government is not withdrawing because they think they can enforce that contract. I don't think any court in the country would allow them to enforce that contract. Therefore, I don't think they would be bound by the Declaration of Taking. As a result of that, I strike the

Declaration of Taking from the files and dismiss the cause" (R. 344).

The order appealed from was then made (R. 60–61). It struck the declaration of taking from the files, vacated the judgment on the declaration and the order granting immediate possession and dismissed the cause.

SPECIFICATIONS OF ERROR

The statement of points relied on by the United States on its appeal (R. 69–70) may be summarized as follows:

The district court erred:

1. In striking the declaration of taking, vacating the judgment thereon and order granting immediate possession, and dismissing the proceedings.

2. In refusing to enforce the contract between the landowners and the Government.

3. In holding that the contract between the parties was negotiated by the agents of the Government in an unethical manner.

4. In holding that the landowners did not know what was in the contract.

ARGUMENT

I

The district court lacked power to strike the declaration of taking

By filing the declaration of taking and depositing the sum estimated to be just compensation, the United States became vested with the property here involved. *City of Oakland* v. *United States,* 124 F. 2d 959, 963

(C. C. A. 9, 1942), certiorari denied 316 U. S. 679; *United States* v. *150.29 Acres of Land, Etc. in Milwaukee Co., Wis.*, 135 F. 2d 878, 881 (C. C. A. 7, 1943). The United States was powerless to withdraw the declaration. *United States* v. *Sunset Cemetery Co.*, 132 F. 2d 163, 164 (C. C. A. 7, 1942). And, as this Court has held, the district court was equally unable to dismiss it. *United States* v. *Carey*, 143 F. 2d 445, 450 (C. C. A. 9, 1944). There is no warrant for the view of the lower court that it is relieved of this disability if (as it believed was the case here) the United States filed the declaration in reliance upon a contract fixing compensation which the court will not enforce. The fact is that by complying with the terms of the statute the United States acquired the property. It is immaterial whether or not it acted wisely or with knowledge of all the facts. In dismissing the declaration—and purporting to divest the title so acquired—the court below exceeded its power.

II

The Government was entitled to have judgment entered for the amount stipulated in its contract with the defendants

In the absence of a binding agreement, compensation for property taken for a public use must be ascertained judicially. But the Fifth Amendment does not prevent the Government and the owner of property from agreeing upon the amount to be paid for it. The parties are not compelled to go to court to determine a question which they can settle for themselves. Therefore, where a valid agreement has been entered

into fixing the purchase price of property, it is the duty of the court in a condemnation proceeding to enter judgment for that sum. *Albrecht* v. *United States,* 329 U. S. 599, 603 (1947); *Muschany* v. *United States,* 324 U. S. 49 (1945); *Danforth* v. *United States,* 308 U. S. 271, 282–283 (1939); *Scott* v. *United States,* 161 F. 2d 1009, 1013 (C. C. A. 6, 1947); *United States* v. *Greer Drainage District,* 121 F. 2d 675, 676 (C. C. A. 5, 1941); *Wachovia Bank & Trust Company* v. *United States,* 98 F. 2d 609, 612 (C. C. A. 4, 1938); *United States* v. *Certain Land in City of St. Louis, Etc.,* 58 F. Supp. 305, 307 (E. D. Mo., 1944); *United States* v. *3.25 Acres of Land, Etc.,* 53 F. Supp. 884, 885–886 (W. D. N. Y., 1943).

In this case, the contract is unexceptionable. The landowners were competent to contract and well aware of the value of the property. The agents of the Government dealt fairly with them in the negotiations. It is true the trial court described the agents' conduct as "entirely unethical" (R. 343) and "pretty cute" (R. 344) and adverted to their "fraud" (R. 344). These characterizations are quite undeserved. The remarks of the court will be searched in vain for a single specification of wrongdoing. So also will be the record.

Moreover, the court stated that defendants had been "perfectly well satisfied" with the resulting contract and that "these people have unquestionably changed their minds" (R. 150). The court did not thereby mean that at first defendants were in a state of blissful ignorance and changed their minds when they were apprised of the truth. For it subsequently ruled

that the verdict could not stand because the contract had not been submitted to the jury. "If," the judge said, "the jury had found that these people had agreed to the value that they did on that contract, I am quite sure that they would not have returned the verdict that they did" (R. 342–343). This can only mean that the contract was executed fairly.

Nonetheless, the court refused to give effect to the contract. The basis of its refusal seems to have been that Mr. Hayes expected to get a perpetual option to rent the property (R. 343) and that: "If he had had a lawyer there, he would have known he wasn't getting it" (R. 344). Clearly, this consideration does not vitiate the contract.

While the agents—laymen like the landowners—dealt directly with the Hayeses, the latter were free to consult their lawyers at any and all stages of the negotiations. There is, of course, no testimony that the Government agents sought to influence them from doing so. Indeed, they had asked their lawyers' opinion as to the adequacy of the consideration and had ignored the consequent advice not to accept, a circumstance, incidentally, which might explain their failure to ask the lawyers for a construction of the contract thereafter drafted. In any event, defendants were quite able to decide for themselves whether it was worthwhile again to approach the lawyers.

One may not say with certainty how far—in the view of the trial court—the Government agents were required to go in governing defendants' conduct. (Perhaps it was the court's thought that the agents themselves were under a duty to carry the proposed

contract to the lawyers.) Be that as it may, it is submitted that the trial court had an erroneous notion of the obligation of Government representatives in dealing with owners of property which the Government wishes to acquire. These owners—even when condemnation proceedings are instituted—are not rendered *pro tempore* incompetent. They do not become wards of the court. They are still free to make contracts. And if their contracts are free from fraud or other invalidating defects, they are binding.[2]

This contract is not tainted. Therefore, it would be gravely unjust to refuse to enforce it merely because the Government did not insist that the other party seek legal advice which in the opinion of the trial court would have been of assistance to him.

It is submitted accordingly that the court below erred in failing to hold that the price stipulated in the contract was the amount which should have been awarded defendants for the land acquired by the declaration of taking.

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[2] In ruling that the contract was inadmissible in evidence, the court referred (R. 150–151) to defendants' apparent impression that the "Government was going to take this land in spite of everything," thus implying defendants would not have sold if aware of the possibility that the Government might reject the award and so leave them in possession of the land. Obviously, this circumstance does not tend to invalidate the contract. In the first place, the impression was correct: thereafter a declaration of taking was filed and defendants were divested of the land. Secondly, whether or not the Government accepted the award, the defendants inevitably would have incurred certain legal expenses if they did not sell. The prospect of avoiding these expenses probably influenced them as greatly as the belief that they were to be divested of title. (See e. g. R. 103.)

CONCLUSION

For the foregoing reasons, it is submitted that the order of the district court should be reversed and the cause remanded with directions to reinstate the dismissed proceedings and to enter judgment for defendants for the amount stipulated in the contract.

Respectfully.

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